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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-894

UNITED STATES STEEL CORPORATION,
Petitioner

versus

SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GARY LAIRD and JOHNNY MARK LAIRD,

and

HUDSON ENGINEERING CORPORATION,
Respondents

REPLY TO OPPOSITION BY MRS. SHIRLEY ROBERTS LAIRD, Individually and for and on behalf of the minors MICHAEL GRAY LAIRD and JOHNNY MARK LAIRD

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MAY IT PLEASE THE COURT:

The respondent seeks to rebut the factual findings of Judge O'Sullivan by referring to Hudson's brief in the Circuit Court and to isolated parts of the record below.

neither of which is a part of the record before this Court. Respondent had the privilege under Rule 21-1 of the rules of this Court to get the record or any portion of it certified to the Supreme Court. Respondent has not chosen to do so and hence is in no position to attack the correctness of the findings of Judge O'Sullivan, particularly in the absence of any contrary findings by the majority. The findings of Judge O'Sullivan are the only judicial pronouncement which sets forth the salient facts. The attacks by the respondent against Judge O'Sullivan's dissenting opinion only serve to highlight the correctness and the importance of his carefully worded findings. Respondent's contention that Judge O'Sullivan's opinion does not contain errors of law but "merely an abuse of discretion" on the part of the District Judge is sheer sophistry. An abuse of discretion is an error of law.

Respondent seeks to imply, p. 2, that we avoided the majority opinion. The complete opinion having been carried at p. 45 of the petition, including the majority opinion, the implication is false.

I. INCOME TAXES

The respondent does not question the existence of a conflict between the circuits on the effect of income taxes against the award and against the effect on loss of earnings.

Respondent's opposition only served to confirm and highlight the confusion which confronted the jury by the comments made by the judge during the trial concerning income taxes.

Respondent pleads at p. 9 of her opposition that if the

Supreme Court should reverse the Court of Appeals, the rule should be prospective, citing no authority. It is fundamental that the final decision reverts to the time of filing suit so that only this particular case is affected.

The disparity between the circuits and the inequities which are thereby created are squarely before this Court and should be resolved so as to make the law uniform and predictable for future cases.

II. UNEXPLAINED FAILURE TO PRODUCE WITNESS

The presumption against Hudson for failure to produce its own important witness is one which Hudson should explain away. No argument by respondent can erase the glaring failure of Hudson to appear before this Court to explain away such failure on its part to produce its important witnesses.

Respondent seeks to champion the position of Hudson when Hudson so far has not even seen fit to favor this Court with an opposition.

This point is of no concern of respondent and her citing from Hudson's brief in the Court of Appeals, which is not even before this Court, is most incongruous and only bears out even more glaringly Judge O'Sullivan's conclusion that the plaintiff and Hudson worked closely together.

No authorities are cited in support of her contentions.

III. DISCRIMINATION

Respondent again criticizes Judge O'Sullivan's findings in the dissent which are the only findings set forth in the

Fifth Circuit's opinions. Judge O'Sullivan's opinion is well buttressed with appropriate conclusions and in the absence of dispute over these facts by the majority, the dissent stands as unassailed and necessarily stands as correct before this Court.

Respondent's statement that Judge O'Sullivan's dissent incorrectly refers to Holmberg as a rebuttal witness is begging the question, because Holmberg was offered in rebuttal, as Judge O'Sullivan found.

If respondent sincerely felt that the dissenting opinion incorrectly sets forth the facts, the respondent should have asked that the record be certified, in whole or in part, so as to indicate in a proper manner in what respects the dissenting opinion was incorrect.

IV. INTEREST AND THE CONSTITUTIONAL QUESTION

The half page rebuttal is bereft of any citation of authorities other than the majority opinion of the Fifth Circuit which cites no legal authorities for the decision other than *Texaco, Inc. v. Lirette*, 410 Fed.2d 1064 (1969). *Texaco* merely states that in diversity cases the state law governs the award of interest. Neither in *Texaco* nor in any other case which has been considered, has the constitutionality of such state statute been at issue.

There is no rebuttal to the wealth of authorities to this important constitutional question which the Court of Appeals decided adversely to us and which was submitted in our brief to the Court of Appeals and upon which question this Court has not ruled.

The question is therefore properly before this Court.

V. SHELL'S REPORT

Here again the respondent cites no authorities.

Further and more importantly, Shell's report should have been allowed into evidence because it was properly identified by the witnesses who were responsible for it, and who made it at a time when no legal proceedings were contemplated and when Shell's employees were not suspicious of litigation.

Here again, to rebut Judge O'Sullivan's findings respondent has restored to two isolated portions of the record. Judge O'Sullivan's findings are the only ones on the subject and were not attacked by the majority and therefore should not be questioned by this Court.

Since respondent has not chosen to certify any part of the record, her quotations are entirely out of order.

This argument on the Shell report is improper because it pertains only to Hudson's objection and only Hudson has a right to reply. Respondent did not object at trial and has no right to be concerned with this issue at this time. Hudson, as previously stated, has thus far remained silent on this important question which materially affects Hudson's position in the case.

The Shell report should have been considered in toto by the jury.

CONCLUSION

The dissent of Judge O'Sullivan pertinently sets forth the major contentions, which we have submitted in our

petition for certiorari. The respondent has not and, we submit, cannot seriously dispute these points.

It is indeed strange that Hudson has not seen fit to champion its own cause and that this is taken up by the respondent. This leads one to believe that respondent and Hudson did work together to the detriment of your petitioner. This was declared to exist by Judge O'Sullivan and there is no denial of this by either respondent or the silent Hudson.

For the reasons stated in our original petition for writ of certiorari and for the reasons set forth by the dissenting Judge in the Fifth Circuit decision we respectfully request that this writ should be granted to petitioner.

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CHAFFE, McCALL, PHILLIPS,
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CERTIFICATE

I, Leon Sarpy, a member of the Bar of this Court, do hereby certify that I have this day served copies of the above and foregoing application to Mr. Joseph L. Waitz, attorney for Shirley Roberts Laird, et al., and to Mr. Philip McMahon, attorney for Hudson Engineering Corporation, by mailing them, postage prepaid, to the said attorneys at their offices, at Houma, Louisiana, on this 22nd day of February, 1972.

ORIGINAL SIGNED
LEON SARPY